service to a bucket shop and that it is a reasonable requirement to oblige an applicant to sign an agreement not to conduct a bucket shop,[13] but the practical difficulty is to prove that an applicant intends to conduct one, and the length of time required to investigate and prove the fact that an apparently *bona fide* brokerage office is in reality a bucket shop. Two months of an active market and the damage is done. The court commenting on this argument says, "the accomplishment of a laudable result does not justify the use of means condemned by a public board acting in accordance with a legislative enactment."

The business of the country, and indeed of the whole world under recent conditions, with all of its ramifications, has come to depend on the activities of our various great exchanges and boards of trade, to such an extent that they can no longer be regarded as purely private associations of persons coming together for their own convenience. The public's standard of values is determined by their dealings and reports, they do have public duties and public uses, and it is becoming more and more necessary that uniformity of treatment in regard to them should be brought about. We suggest federal incorporation and regulation as the best possible solution under the circumstances.

T. L. H.

PROPERTY—RULE AGAINST PERPETUITIES—PURPOSE AND APPLICATION—The Rule against Perpetuities, as it exists today in the English and American systems of law, is the result of a growth extending over a number of years, and having its beginning in comparatively modern times: that is, it is a branch of the law which has arisen since the middle of the sixteenth century. Prior to the *Statute of Uses* (1535),[1] and the *Statute of Wills* (1540),[2] there seems to have been no discussion as to remoteness, when related to the creation of estates and interests. This was probably because there was no necessity for it in the transactions of the day. True, in conveying realty, no fee simple could be given to commence *in futuro*—but this was because of the peculiar nature of livery of seisin. After the two statutes, above referred to, a doctrine arose which laid down the rule that there could not be a "possibility on a possibility."[3] The effect of this was to retard the idea involved in the Rule against Per-

[13] Board of Trade v. Christie, *etc.*, Co., *supra*, note 1; Stock Exchange v. Board of Trade, 196 Ill. 396 (1902); Board of Trade v. Cella Commission Co., *supra*, note 4; Sullivan v. Postal Tel. Co., 123 Fed. 411, 61 C. C. A. 1 (1903); Illinois Commission Co. v. Cleveland Tel. Co., 119 Fed. 301 (1902); Smith v. Western Union Tel. Co., 84 Ky. 664 (1887).

[1] 27 Hen. VIII, Chap. 10.

[2] 32 Hen. VIII, Chap. 1.

[3] Rector of Chedington's Case, 1 Co. 153a (Eng. 1598), by Lord Popham.

petuities.[4] The discussion of remoteness as related to the vesting of estates seems to have first occurred in *Child* v. *Baylie*,[5] in the argument of counsel; but was not considered in the decision of the court.[6] The basis of the modern Rule was laid by Lord Nottingham in the *Duke of Norfolk's Case* [7]—that the distance in time was the test for the validity of a contingent interest; [8] but that time was then limited to lives in being at the death of a testator. Then came the extension which included the life of the next taker until he had reached his majority. It is curious to note that while this seems to have been allowed as early as 1678,[9] it was not incontrovertibly settled until the case of *Stephens* v. *Stephens*.[10] The final step, allowing the limitation after the life in being, to be a term of twenty-one years in gross, without respect to the infancy of any person whatever, was ratified in *Cadell* v. *Palmer;* [11] although here, too, a much earlier decision [12] had been to the same effect, without removing the question from the realm of doubt. Some time previous to this last step, it had been decided that it was a matter of no consequence, whether for a *life,* or *lives,* in being at the creation of the interest.[13] It will thus be seen that the Rule, as it exists today, in its entirety, is less than one hundred years old.[14]

What, then, is the Rule against Perpetuities and its purpose? Perhaps the simplest statement is, that it is that rule which prevents the vesting of an interest later than twenty-one years (and some months) after some life or lives in being at the creation of the inter-

[4] Although doubted in several later cases, this doctrine does not seem to have been definitely overthrown till the Duke of Norfolk's Case, 3 Ch. Cas. 1 (Eng. 1681).

[5] Cro. Jac. 459 (Eng. 1618).

[6] So in Pells v. Brown, Cro. Jac. 590 (Eng. 1620), the decision was based on another point.

[7] *Supra,* note 4.

[8] Schaefer v. Schaefer, 141 Ill. 337 (1892); Smith's Appeal, 88 Pa. 492 (1879).

[9] Taylor v. Biddal, 2 Mod. 289 (Eng. 1678).

[10] 2 Barnard K. B. 375 (Eng. 1736).

[11] 1 Cl. & F. 372 (Eng. 1832).

[12] Lloyd v. Carew, Prec. Ch. 72 (Eng. 1698). This was a House of Lords' decision overruling the unanimous judgment, in which the Chancellor had taken part; but at the time there was only one law lord in the House, which probably accounts for the fact that the decision had so little weight. In America, the case of Barnitz v. Casey, 7 Cranch 456 (U. S. 1813), adopted the same view as to the twenty-one years being a term in gross.

[13] Thelluson v. Woodford, 11 Ves. 112 (Eng. 1805). To the same effect is Madison v. Farmon, 170 Ill. 65 (1897).

[14] For a very detailed account of the origin and growth of the Rule against Perpetuities see Gray, Perpetuities (2d Ed.), Chap. V.

est.[15] This is a period which the law has fixed for the creation of future estates and interests; and really contains in itself the definition of a "perpetuity"—that is, a future limitation which is not to vest until after the expiration of, or which will not necessarily vest within, that fixed period.[16] At one time there was a prevailing idea that alienability was the test by which a perpetuity was to be judged;[17] and indeed, it was the intrusion of this idea, that caused a great deal of the difficulty in dealing with the subject. The purpose of the Rule is to prevent estates or interests from being suspended for too long a time as to their vesting. As soon as the interest vests, the Rule against Perpetuities no longer has any application. As a natural result of this, if the interest is a vested one, it becomes unnecessary to consider the Rule against Perpetuities at all—for it does not apply to vested interests,[18] but to future contingent interests, of either a legal or equitable nature.[19] Yet it should be noted that it is possible to apply it to a vested interest in special cases, as where the exact number of a class is not to be determined necessarily within twenty-one years after a life in being.[20]

With these principles in mind, the next question is as to the method of application. Primarily it is a rule of law, rather than of interpretation. The instrument concerned must first be construed, and then the court can consider whether the result secured is subject to the Rule.[21] But if the instrument is ambiguous, and one interpretation would be void under the Rule, while the other would be valid, it is then permissible to consider the Rule in arriving at a conclusion between the two possible views, and thus effectuate the intention of the maker if possible.[22] Having reached the point where the applicability of the Rule may be considered, this is judged of, looking from the time of the creation of the limitation or power,[23] and the circumstances then existing must be the governing ones. In the case

[15] Gray, Perp., Sec. 201.

[16] Ferguson v. Ferguson, 39 U. C. Q. B. 232 (Can. 1876); Waldo v. Cumming, 45 Ill. 421 (1867); Phila. v. Girard, 45 Pa. 9 (1863).

[17] Curtis v. Lukin, 5 Beav. 14 (Eng. 1842); Avern v. Lloyd, L. R. 5 Eq. 383 (Eng. 1868); Barnum v. Barnum, 26 Md. 119 (1866).

[18] Farnam v. Farnam, 53 Conn. 261 (1885); Johnston's Estate, 185 Pa. 179 (1898); Gray, Perp., Sec. 205.

[19] Matter of Walkerly, 108 Cal. 627 (1895); Howe v. Hodge, 152 Ill. 252 (1894); Brattle Sq. Church v. Grant, 3 Gray 142 (Mass. 1855).

[20] Gray, Perp., Sec. 205a.

[21] Pearks v. Moseley, L. R. 5 App. Cas. 714 (Eng. 1880); *In re* Mervin, L. R. 3 Ch. 197 (Eng. 1891); Van Nostrand v. Moore, 52 N. Y. 12 (1873).

[22] Martelli v. Holloway, L. R. 5 H. L. 532 (Eng. 1872); *In re* Turney, L. R. 2 Ch. 739 (Eng. 1899); Du Bois v. Ray, 35 N. Y. 162 (1866).

[23] Thomas v. Gregg, 76 Md. 169 (1892).

of a deed, the time of delivery is the starting point [24]—in a will, the date of the testator's death.[25] If in the instrument, the vesting depends on either of two contingencies, and by one of them, the gift would be good under the Rule against Perpetuities, it is generally held that the fact that it would be bad under the other, is immaterial.[26] Yet it must be observed that a case like this, should be distinguished from one where the gift hinges on a single event, which may have two contingent parts, good under one, but not under the other—there, the gift is void.[27] There are certain events, upon which the gift may be based, which have come to have a recognized effect in relation to the Rule against Perpetuities. Thus, a limitation on a definite failure of issue of one in being at the time the instrument takes effect, or twenty-one years thereafter, is generally held good; [28] while if based on an indefinite failure, it is bad.[29] So a limitation either in fee,[30] or for life,[31] to the unborn child of a living person is good; and the gift over on the death of the infant in the latter case is good, if it can occur within twenty-one years of the death of the parent.[32] It is not possible to evade the Rule by the creation of a trust,[33] though it is held that if the trust be for a recognized charity, the Rule does not apply.[34]

That the question of vesting is the all-important one and the first point of attack, is well illustrated by a recent case in Illinois.[35] There a fund was left in trust for thirty years, the income to be paid to the testator's children; the principal to be paid them at the end of

[24] Cooke v. Cooke, L. R. 38 Ch. D. 202 (Eng. 1887); Case v. Green, 78 Mich. 540 (1889).

[25] Hale v. Hale, L. R. 3 Ch. D. 643 (Eng. 1876); McArthur v. Scott, 113 U. S. 340 (1884); Hosea v. Jacobs, 98 Mass. 65 (1867); Hillen v. Iselin, 144 N. Y. 365 (1895).

[26] Evers v. Challis, 7 H. L. 531 (Eng. 1859); Halsey v. Goddard, 86 Fed. 25 (1898); Seaver v. Fitzgerald, 141 Mass. 401 (1886); Fowler v. Depau, 26 Barb. 224 (N. Y. 1857).

[27] *In re* Hancock, L. R. 1 Ch. 482 (Eng. 1900).

[28] *In re* Lowman, L. R. 2 Ch. 348 (Eng. 1895); Forman v. Troup, 30 Ga. 496 (1860); Rapp v. Rapp, 6 Pa. 45 (1847).

[29] O'Mahoney v. Burdett, L. R. 7 H. L. 388 (Eng. 1874); James v. Rowland, 52 Md. 462 (1879); Adams v. Farley, 18 So. 390 (Miss. 1895); Davies v. Steele, 38 N. J. E. 168 (1884); Diehl v. King, 6 S. & R. 29 (Pa. 1820).

[30] *In re* Powell, L. R. 1 Ch. 227 (Eng. 1898).

[31] Routledge v. Dorril, 2 Ves. Jr. 357 (Eng. 1794); Owen's Petition, 3 Pa. Dist. 328 (Phila. Co. 1894).

[32] Stuart v. Cockerell, L. R. 7 Eq. 363 (Eng. 1869); Seaver v. Fitzgerald, *supra*, note 26.

[33] Bigelow v. Cady, 171 Ill. 229 (1897).

[34] Jones v. Habersham, 107 U. S. 174 (1882); City of Richmond v. Davis, 103 Ind. 449 (1885); Phila. v. Girard, *supra*, note 16; The Apprentices' Fund Case, 2 Pa. Dist. 435 (Phila. Co. 1893).

[35] O'Hare v. Johnston, *et al.*, 113 N. E. 127 (Ill. 1916).

the period named. Among the provisions was this, that if either died leaving a child or children, they were to take the parent's share of the income, and at the expiration of the thirty years, receive the principal. It was strongly argued that the ultimate gift was contingent on the grandchildren surviving the thirty-year period, and so too remote. But the court held that the gift of the income was vested and that this vested in them the gift of principal. This conclusion was based on the language of the will, and while in essence it was a mere question of construction, yet its bearing on the question of the Rule against Perpetuities, was of paramount importance. The distinction was made between that state of facts, and those where the income is given to the children, and the principal to the grandchildren, with a right to take their parent's share of the income.[36] Being a vested interest, it was immaterial whether the holder of it had the right to possession and enjoyment within the period allowed by the Rule.[37] It can thus be seen that while the Rule itself is clear and defined,[38] its application raises questions, often of great difficulty, because of the necessity of knowing whether the interest is vested or not; whether it is for a charity or a mere private object of the maker's bounty;[39] and similar points.

R. T. B.

TRESPASS—PRIVATELY OWNED WATER PIPE—LEAK FROM PIPE INTO STREET—"RYLANDS V. FLETCHER DOCTRINE"—The rule in *Rylands* v. *Fletcher*[1] has been covered so completely in the columns of this magazine,[2] that it would seem an affectation of learning to advert to it further. But in a recent Pennsylvania Superior Court decision,[3] a reference was made to it in a case presenting such interesting aspects as to seem worthy of comment. A former owner of

[36] Kountz's Estate, 213 Pa. 390 (1906)—here the gift of the principal was held contingent.

[37] Seaver v. Fitzgerald, *supra*, note 26.

[38] As there are statutes in many states either defining or limiting the rule, these should be consulted in order to note changes from the common law, in the respective jurisdictions.

[39] Bates v. Bates, 134 Mass. 110 (1883); Hartson v. Elden, 50 N. J. E. 522 (1892)—trusts for maintaining graves, or the like.

[1] "The person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief, if it escapes, must keep it at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape." L. R. 3 H. of L. 330 (Eng. 1868).

[2] Article by John Marshall Gest on "The Natural Use of Land," in 33 AMERICAN LAW REGISTER 1, "The Rule in Rylands v. Fletcher," by Francis H. Bohlen, in 59 AMERICAN LAW REGISTER 298.

[3] Abraham, Appellant, v. Yardum, 64 Super. Ct. 225 (Pa. 1916).